



LEGAL BRIEF: AUGUST 18, 2006

NEW IDEA REGULATIONS REQUIRE PARENTAL CONSENT TO BILL MEDICAID

The new Individuals with Disabilities Education Act (IDEA) regulations were published by the U.S. Department of Education (USDE) in the Federal Register on August 14, 2006. ***The regulations will become effective on October 13, 2006.***

Among other things, ***the new regulations require local education agencies (LEA) to obtain written parental consent "each time access to" Medicaid "is sought"*** to pay for special education related services provided to Medicaid-eligible students. This requirement was not included in any previous IDEA regulations.

LEAs that participate in school-based Medicaid fee-for-service billing programs are strongly encouraged to review the forms and procedures currently used for obtaining parental consent and verify with their respective legal counsels that the forms and procedures comply with the requirements for obtaining parental consent to bill Medicaid under FERPA and the new IDEA regulations. FERPA and the IDEA regulations are enforceable by the USDE.

Highlights of the IDEA parental consent requirement follow.

• Text of the New IDEA Requirement for Parental Consent to Bill Medicaid

The new IDEA regulation, 34 CFR § 300.154(d) provides, in part, the following:

"(d) Children with disabilities who are covered by public benefits or insurance.

(1) A public agency may use the Medicaid

or other public benefits or insurance programs in which a child participates to provide or pay for services required under this part, as permitted under the public benefits or insurance program, except as provide in paragraph (d)(2) of this section.

(2) With regard to services required to provide FAPE to an eligible child under this part, the public agency - - " . . .

"(iv) (A) Must obtain parental consent, consistent with Sec. 300.9, each time that access to public benefits or insurance is sought; and
(B) Notify parents that the parents' refusal to allow access to their public benefits or insurance does not relieve the public agency of its responsibility to ensure that all required services are provided at no costs to the parents."

• Comparison of the IDEA Requirement with FERPA Rules

The new IDEA requirement for parental consent is consistent with the Family Educational Rights and Privacy Act (FERPA) in that FERPA requires, with limited exceptions, that LEAs obtain written parental consent prior to disclosing personally identifiable information from a student's educational record. Personally identifiable information regarding a student's health status and health services is routinely included in the records that LEAs disclose to Medicaid agencies for billing purposes. This type of disclosure requires parental consent under FERPA and the new IDEA regulations at 34 CFR § 300.154(d) as quoted, in part, above.

However, FERPA rules and USDE's historical interpretations of the FERPA rules do not require LEAs to obtain parental consent "each time that access to" Medicaid "is sought", as is now required by language in the new IDEA regulation. The IDEA regulation, as originally proposed in June 2005, did not contain this language. USDE's purpose and intent for adding the language to the final regulation is unclear and, as a result, the language is subject to widely different interpretations. For instance:

- One extreme interpretation would require LEAs to obtain a separate parental consent to bill Medicaid for each service provided for a student, and
- Another (and, perhaps, more reasonable) interpretation would require the LEA to obtain only one consent that would cover the ongoing periodic billing for services provided to a student.

The latter interpretation appears consistent with historical USDE parental consent guidelines under FERPA.

In the absence of clarification from appropriate state and federal agencies, any LEA interpretation of the IDEA parental consent requirement should be reviewed with the LEA's legal counsel prior to implementing changes in forms and procedures.

• Required Information for Parents

As part of the written consent, the IDEA regulations, at 34 CFR § 300.9, require the LEA to fully inform the parents about all information

that the LEA proposes to disclose to the Medicaid agency for billing purposes. The parents must agree or consent, in writing, to this disclosure before the LEA can bill Medicaid. Parents have the right to refuse to give consent and the right to revoke consent at any time. The LEA must inform the parents of these rights and advise parents that refusing to give consent or revoking consent to bill Medicaid does not relieve the LEA of its obligation to provide all required services at no cost to the parents.

• Communication Mode

Communication with the parents with regard to the disclosure of his/her child's personally identifiable information to the Medicaid agency must be in the parents' native language or another mode of communication.

• Availability of an Analysis of the Full IDEA Regulations

Sue Gamm, PCG Special Education Consultant, has prepared an analysis of the full IDEA regulations. To receive a copy, please send your request to suegamm@aol.com.



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